No. 21980

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GRANT M. ACTON, et al,	)	
	)	
Appellants,	)	No. 21980
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	
	)	

APPELLANTS' OPENING BRIEF

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Attorney for Appellants

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I N D E X

I

TABLE OF CASES AND AUTHORITIES CITED

II

JURISDICTION

This action was originated by the United States of America in condemnation of property interest under 40 U.S.C. 257 and 10 U.S.C. 2663 establishing jurisdiction in the United States District Courts. *Forbes v. U.S.*, 268 Fed. 273 (C.C.A. Ala. 1920). This appeal to the Circuit Courts of Appeal is undertaken pursuant to 28 U.S.C. 1291.

III

STATEMENT OF THE CASE

The Congress of the United States, seeking to develop uranium source materials within the continental United States, passed the Atomic Energy Act of 1954, 42 U.S.C. 2011, et seq. The Congress recognized that private initiative and monies would be needed for such development and publicly entered a patriotic appeal to individual persons to prospect and develop uranium ore bodies on Public Lands.

Typical of the public appeal made pursuant to the provisions of the Atomic Energy Act of 1954 were the

statements of Lewis L. Strauss, Chairman of the Atomic Energy Commission, stated in a talk that he made on February 4, 1955, to the National Western Mining Conference in Denver, Colorado:

> "The paramount responsibility of the Atomic Energy Commission under the law is to advance a defense in security of the Nation, but second only to that prime obligation is the duty we have to develop and direct the uses of atomic energy for the general welfare of the cause of peace."
>
> "To meet both obligations -- military uses and the benign application -- the Commission directs a constantly expanding program which must at all times, have sufficient raw materials. And to insure that steady flow of those materials, we elected to rely upon reasonable incentives to private enterprise to bring about the greatest development of our uranium sources in the shortest possible time. This policy has succeeded and is a reaffirmation of the ingenuity and drive of our American free enterprise system."
>
> "Much credit for this is due to the individual prospector and operator. He has combed the area with his Geiger counter and worked his claim, often under rugged conditions that add considerable personal hardship. Sometimes this prospector was a veteran sourdough. Sometimes he was a complete novice to the uncertainties and privations of pioneering in a new industry and a forbidding terrain that could discourage all but the hardiest and most courageous." (T.R. 223-25).

Subsequent to the passage of the Atomic Energy Act of 1954 the Defendants-Appellants commenced prospecting

for uranium ore bodies on the Muggins Mountains in Western Arizona (T.R. 136, 168, 170-77). Valuable ore bodies were discovered (T.R. 135-40, 143, 170-77), and claims were located under Arizona mining law (T.R. 135, 138, 140, 145, 165-67). By the spring of 1956, the Defendants-Appellants had obtained Source Material Licenses from the Atomic Energy Commission (T.R. 147, 150). By the beginning of the year 1958 the Defendants-Appellants had not only located substantial numbers of claims, but had also spent substantial time and funds in the building of roads, causing geological surveys to be undertaken and completed, and had acquired various items of equipment in their preparation to commence actual mining operations (T.R. 137, 139, 142).

On January 15, 1958, the Department of the Army commenced the condemnation proceedings in this action. Thereafter, the applications of Defendants-Appellants for Atomic Energy Commission exploration permits were honored and accompanied by the reservation, in favor of the Commander, Yuma Test Station, stating as follows:

> "The Commander, Yuma Test Station, shall have the right to withdraw this right of entry either in whole or in part as he deems is required by military necessity." (T.R. 154-57, 185-86).

The uranium prospecting permit, with the accompanying reservation in favor of the Commander, Yuma Test Station, never bore fruit by the issuance of preferential right leases from the Atomic Energy Commission, as normally would have occurred in due course as to the source deposits found by Defendants-Appellants, 42 U.S.C. 2097, due to the fact that the Commander, Yuma Test Station, terminated the prospecting permits immediately after their issuance (T.R. 159).

The present Defendants-Appellants in this action joined issue in the case and, on November 3, 1966, the Honorable Walter E. Craig, United States District Judge, entered an order denying Defendants-Appellants Motion for Summary Judgment and granting the Motion for Summary Judgment filed on behalf of the Plaintiff-Appellee United States of America (T.R. 247-50). Prior thereto, on July 13, 1964, the Honorable William C. Mathes, United States District Judge, had entered an order denying Plaintiff-Appellee's Motion for Summary Judgment against the instant Defendants-Appellants (T.R. 221-22).

Attorneys for Defendants-Appellants and for Plaintiff-Appellee United States of America, did, on December 15, 1961, enter into a stipulation whereby it

was agreed that if any claims for compensation were allowed for any of the defendants, all of the defendants represented by counsel for Defendants-Appellants would be afforded a reasonable opportunity to file answers and supplemental pleadings and to be heard in Court on any relevant issues (T.R. 188-89).

IV

SPECIFICATIONS OF ERROR

1. The United States District Court erred in its finding that the Defendants-Appellants' interest in the lands in question was that of a revocable right of entry.

2. The United States District Court erred in its ruling that the interest of the Defendants-Appellants in the lands in question was not an interest compensable under the laws of condemnation.

V

POINTS OF LAW AND FACT

The individual miners bringing this Appeal spent their time and large sums of money in the exploration and development of uranium ore bodies for the purpose

of opening productive mines to supply uranium to the Atomic Energy Commission (T.R. 137, 139, 142). The efforts of these individual miners culminated in the discovery of valuable uranium ore bodies (T.R. 135-40, 143, 170-77). Source Material Licenses from the Atomic Energy Commission were issued (T.R. 147, 150). At this point in time the lands in question, being a part of the Yuma Test Station, and administered by the Department of the Army, were left open to the Defendants-Appellants by the Department of the Army. The Atomic Energy Commission uranium prospecting permits issued upon a quasi-lease basis requiring an annual rental per acre (T.R. 154-57, 185-86), and containing a reservation in the Commander of the Yuma Test Station to revoke the right to enter upon the Test Station for military necessity, were issued after the commencement of the condemnation proceedings (T.R. 1); the inception of revocable rights of entry actually occurred after the condemnation proceedings had begun. The interest of Defendants-Appellants, if any, arose prior to the commencement of the condemnation proceedings in this case.

Defendants-Appellants have asserted in this cause that but for the acts of the Department of the Army

their activities upon the lands in question would have resulted in the valuable ore bodies found by them being worked and made productive under preferential right leases from the Atomic Energy Commission (T.R. 223-36). Nowhere does the United States of America contest this position. The Atomic Energy Act of 1954, 42 U.S.C. 2011, et seq. provides that upon bringing of the claim into production the ores are owned by the United States of America but the miner receives a percentage fee for the materials mined. The miners who have brought this Appeal contend that they found and developed something of value in the nature of interests in the lands in question, which interests have present determinable value as found Source Deposits of uranium ores and that these interests would have matured into interests normally recognizable under the laws of condemnation had they been allowed to proceed and obtain preferential right leases. Had the Atomic Energy Commission obtained the interests of the Defendants-Appellants, even if said interests were to be found to be solely a right to enter, the Atomic Energy Commission would have had to pay for the value taken in condemnation. 42 U.S.C. 2221 and 2096.

Defendants-Appellants contend that the District Court erred in finding that their interests were merely that of a revocable right of entry. The designation of their interests as a "right to enter" and its revocability for military necessity did not occur until after condemnation proceedings had commenced and their interest, such as it might be determined to be, had already been established. Thus the District Court made no determination whatsoever of the actual interests of the Defendants-Appellants in and to the lands in question. If, on the other hand, the interests of Defendants-Appellants are determined by the uranium prospecting permits issued after condemnation proceedings had begun (T.R. 154-57, 185-86), the record in this cause is devoid of any statement reference or claim whatsoever by the United States of America that military necessity required the revocation of the rights and interests of Defendants-Appellants. 10 C.F.R. 60.9(e) does in fact allow the government agency administering the lands, in this case the Department of the Army, the right to include special terms. Having included the special term of revocation by "military necessity" a showing of such military necessity is a condition precedent to the

termination of the rights of Defendants-Appellants and until such condition precedent be met the Defendants-Appellants must be considered to have an interest which has never been revoked and is therefore not revocable for the purposes of this action.

Defendants-Appellants at no time during the long duration of this cause were allowed to present at trial direct evidence of the nature and extent of their claim into the lands in question. Under the actual situation of conditions imposed after condemnation proceedings had begun Defendants-Appellants contend that they are not only entitled to full and complete hearing so that the nature of their interest can be determined, but that under the facts as developed in the record in this cause the Defendants-Appellants in fact do have an interest which should be declared compensable in condemnation proceedings.

In the case of *United States v. Town of Nahant*, 153 F. Rep. 520, at 523, the United States of America sought to condemn the interest of the town of Nahant in a piece of property which the town had previously sought to condemn but had not completed condemnation by the payment of the condemnation proceeds. The

Court recognized that the Town of Nahant did not have an "interest in real property." The Court nonetheless required that compensation be paid in the condemnation proceedings by the United States for the equitable interest of the Town of Nahant. The Court stated:

> "We think the Constitution contemplates just compensation for such interest as a party has and such as is taken. Of course, it must be an interest or a right recognized as of some value under legal or equitable principles."

The Court in *United States v. Town of Nahant* acknowledged an accepted principle in condemnation, to the effect that the United States Courts in condemnation cases have the right to sit as Courts of Equity and in such capacity may declare compensable interest even though the interest has not matured into "interest in real property." Likewise, asserting equitable powers on the part of the United States Court, in cases otherwise inapplicable to the instant situation, see *Admiral Oriental Line v. United States*, 86 F.2d 201, and *Werner v. United States*, 188 F.2d 266.

VI

CONCLUSION

Defendants-Appellants respectfully request that this Court exercise its powers in equity and recognize the value of the ore bodies located at great expense by Defendants-Appellants and declare that the interests of Defendants-Appellants, unmatured into preferential right leases under the Atomic Energy Act of 1954 due to the intervention of the Department of the Army, are recognizable interests in condemnation and that the fact that another agency of the United States Government other than the Atomic Energy Commission has limited and taken their interests does not alter their value nor alter the right of the holders thereof to reasonable compensation in condemnation.

Respectfully submitted,

/s/ Thayer C. Lindauer

Thayer C. Lindauer
Attorney for Defendants-Appellants

VII

REFERENCE TO EXHIBITS

[Note: Exhibits are listed in order of their appearance with page reference to the Record.]

ATTORNEY'S CERTIFICATION

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

/s/ Thayer C. Lindauer

Thayer C. Lindauer

AFFIDAVIT OF SERVICE BY MAIL

THAYER C. LINDAUER, being duly sworn, says that he deposited three (3) copies of the foregoing Appellants' Opening Brief in final printed form in the United States post office in the City of Flagstaff, State of Arizona, enclosed in an envelope addressed to Mr. Roger P. Marquis, Assistant Attorney General, Land & Natural Resources Division, U. S. Department of Justice, Washington, D. C. 20530, with postage fully prepaid; he further states that he deposited twenty (20) copies in the United States post office in the City of Flagstaff, State of Arizona, duly addressed to the Office of the Clerk, U. S. Court of Appeals for the Ninth Circuit, San Francisco, California 94101.

Both mailings were made on the 6th day of December, 1967.

/s/ Thayer C. Lindauer

Thayer C. Lindauer

Subscribed and sworn to before me
this 6th day of December, 1967.

/s/ Annette Y. Lind [SEAL]

Notary Public

My commission expires
November 1, 1971.